Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

PEACE & LOVE, INC., an Oklahoma Corporation; ROB BOULDEN; COLIN BRAUMILLER and ALLEN S. BRAUMLLER, individuals,

Petitioners,

vs.

KEITH MARSHALL d/b/a R. K. MARSHALL CONSTRUCTION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

RISPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

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Respondent, Keith Marshall d/b/a R. K. Marshall Construction, opposes as follows the petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners enumerate six constitutional and statutory provisions allegedly involved in this case. However, provision No. 2, Article 2, § 7 of the Constitution of the State of Oklahoma, was not cited in the trial or appeal of this case, nor in the Petition in this Court other than in the enumeration of provisions. The same is true for provision No. 3, Article 2, § 6 of the Constitution of the State of Oklahoma, and provision No. 5, Okla. Stat. tit. 15, § 323.

STATEMENT OF THE CASE

This is indeed a debt-collection case, arising out of an oral construction contract. Contrary to Petitioners' portrayal, however, is it nothing more than that. The essence of the case is decidedly not any "tension between the local population and outsiders" [Petition 4]. The case is governed entirely by its own specific facts. The federal questions that Petitioners now allege did not arise in the trial of the matter and were but the tiniest fraction of the argument on appeal. As shown by the recitation of facts to follow, there is no cause for this Court's review of the case.

The Oral Contract. On July 22, 1993, Al Braumiller asked Marshall to submit a bid for construction work. Marshall submitted a bid to Al Braumiller on July 23, 1993, and Al Braumiller directed Marshall to commence work, which began on July 28, 1993. On August 6, 1993, a certificate of incorporation was filed with the Oklahoma Secretary of State

for Peace & Love, Inc. (a material fact which Petitioners do not mention in their Statement of the Case). On August 10, 1993, Al Braumiller directed Marshall to stop work because the beer license applications for the proposed clubs were denied. Then Al Braumiller asked Marshall to resume the remodeling, which Marshall's crew did on August 23, 1993, and continued until October 15, 1993.

Partial Payments. During the course of the work, Marshall received four partial payments, the first of which was a check drawn on an account of Rob Boulden and Colin Braumiller and signed by Rob Boulden; the second was a check drawn on the same account and signed by Colin Braumiller; and the third and fourth were checks drawn on the personal account of Al and Patsy Braumiller. At the conclusion of the project, Marshall submitted an invoice to Peace & Love and then to Al Braumiller, who wrote to Marshall requesting documentation of the costs, also saying:

> As I told you in the beginning, I will see that all documented and approved work and materials are paid for. . . . I will "guarantee" reasonable payment of reasonable charges if the Company fails to pay you as I have suggested above.

[Plaintiff's Ex. 6]. Later Al Braumiller again wrote Marshall:

> I continue in my intention to see that you are fairly compensated by P & L. . . . If eventually there are unpaid amounts, which I can understand and which you feel I have guaranteed, then please contact me at that time.

[Plaintiff's Ex. 16].

Suit to Collect. Marshall sued to collect the unpaid balance, alleging that he had contracted with Rob Boulden and Colin Braumiller as individuals; that he had contracted with Peace & Love, Inc.; and that Al Braumiller had personally guaranteed that Marshall would be compensated [R. 1-4]. Al Braumiller moved for summary judgment alleging that the guaranty was invalid and unenforceable [R. 100-113]. Marshall amended his petition without leave of court to allege that Al Braumiller was a maker on the contract [R. 126-127]. The trial court denied Al Braumiller's motion for summary judgment and struck Marshall's amended petition.

Pre-Trial Order. A pre-trial order was entered providing for trial of Marshall's original counts and permitting Marshall to amend his petition instanter and proceed with a cause of action against Al Braumiller as a principal on the contract [R. 140-146]. Marshall amended his petition alleging that Al Braumiller had breached an oral construction contract [R. 147-148]. Al Braumiller moved for summary judgment on the basis that he was not a contracting party and (for the second time) that he was not a guarantor [R. 186-237]; the motion was overruled. On the first day of trial, Petitioner Al Braumiller sought to have the pre-trial order amended to show the guaranty claim dropped as a result of the amended petition (filed on the same day as the pre-trial order). The trial court did indeed amend the pre-trial order but amended it to include both the contract claim and the guaranty claim.

Appeal of Summary Judgment Denials. Petitioner Al Braumiller appealed the denial of his two summary judgment motions, arguing that both Oklahoma and federal law mandate that summary judgment be granted if there is no substantial controversy as to any material fact [R. 100-113]. The appellate court affirmed the decisions on these two motions because issues of fact had indeed remained as to whether the language of Al

Braumiller's letters created a guaranty and as to whether he, having admitted in his motion that he had accepted Marshall's initial bid, was a party to the construction contract [Opinion at ¶¶ 9, 10; Petition at a7].

Appeal of Trial Rulings and Jury Verdict. Al Braumiller appealed admission of the two letters he wrote to Marshall; the appellate court affirmed because Al Braumiller provided no authority for his arguments, because he had not objected to their admission, because they were evidence of a guaranty, and because they were relevant to the issue of the existence of a contract [Opinion at ¶ 11; Petition at a7-a8].

Petitioners alleged on appeal that they were deprived of a fair and impartial jury trial because voir dire was not conducted on the record; the appellate court affirmed because Petitioners provided no authority for their argument, because they made no allegation of actual prejudice, and because they themselves had been charged with requesting such a record [Opinion at ¶ 13; Petition at a8].

Petitioners alleged on appeal that they were "subjected to trial by ambush" and thereby denied due process by the trial court's amendment of the pre-trial order at the beginning of trial to reflect Marshall's claims that Al Braumiller was a party to the contract and a guarantor. The appellate court affirmed because Al Braumiller himself had sought to have the pre-trial order amended at the beginning of trial, because the guaranty claim had been raised in the initial petition and identified as an issue in the pre-trial order, because Petitioners had not requested a continuance when the pre-trial order was amended, because no surprise or prejudice was shown, and because Petitioners failed to provide authority for their contention that they were denied due process [Opinion at ¶¶ 14-16; Petition at a9-a10].

Petitioners alleged error in jury instruction No. 10; the appellate court affirmed because Al Braumiller had failed to object to that instruction and because it was correct on its face [Opinion at ¶¶ 17-18; Petition at a10-a11].

Petitioners appealed the jury verdict as ambiguous and incomplete; the appellate court affirmed because Al Braumiller had waived any error in not objecting to the verdict form on the guaranty issue and in not submitting more specific proposed verdict forms and because judgment had been entered according to the manifest intent of the jury [Opinion at ¶¶ 19-24; Petition at a11-a13].

Petitioners alleged error on appeal in the "disregard" of the corporate entity; the appellate court affirmed because the contract had been entered into before the corporation came into existence, because none of the payments had been drawn on a corporate account, because Rob Boulden had testified to uncertainty whether the corporation had ever opened a bank account, because the beer license application had not been in the name of the corporation, and because the corporation had not been named in the business loan [Opinion at ¶¶ 29-30; Petition at a15].

Petitioners alleged error in instruction No. 8 on piercing the corporate veil; the appellate court affirmed because there was competent evidence of the existence of most of the factors for determining whether a corporation is a mere instrumentality of an individual [Opinion at ¶¶ 31-32; Petition at a15-a17].

Petitioners alleged error in the award of prejudgment interest on the basis that trial was required to determine the amount of the damages; the appellate court agreed and reversed [Opinion at ¶¶ 25-26; Petition at a13-a14].

Petitioners alleged error in the award of attorney fees without apportionment among the various Petitioners, in the inclusion of the corporation in the award, and in the failure to award attorney fees to the corporation as a prevailing party. The appellate court affirmed because Petitioners provided neither evidence of abuse of discretion nor any record of an objection to lack of expert testimony and because a verdict was indeed rendered against the corporation [Opinion at ¶¶ 27-28; Petition at a14-a15].

STAGE AT WHICH FEDERAL QUESTION RAISED

Petitioners equivocate about the raising of federal questions in this case, asserting that Al Braumiller "attempted" to raise denial of due process and equal protection in his motions for summary judgment [Petition 11]. The fact is that neither motion addresses these, nor any other, federal questions. Both motions list as "undisputed material facts" matters that were indeed disputed, and both motions were denied at trial and affirmed on appeal on that basis.

Petitioners then assert that constitutional questions "fully emerged" after trial [Petition 11]. The fact is that whether Al Braumiller was a guarantor under the statute was an issue of fact (did the language of his letters create a guaranty?), and whether the other individual Petitioners were shielded from liability by the general corporation statute was also an issue of fact (was the contract made before or after the corporation was formed?). At the same time that Al Braumiller contends that he was denied due process in being "denied notice" of trial on the guaranty claim [Petition 12], the record shows that he himself filed two motions for summary judgment in the months before trial, in both of which he addressed the guaranty claim, which had been set forth both in the initial petition and in the pre-trial order. At the same time that Petitioners claim that no evidence

was introduced that the corporation was a mere instrumentality of an individual, the appellate court found competent evidence that *most* of the instrumentality factors existed and also found that the corporation came into existence *after* the construction contract was made.

At the same time that Petitioners contend that the appellate court "failed to rule on the constitutional questions" — an argument that occupied one and one-half pages of their 30-page appellate brief in chief — they also concede that the court cited a lack of factual support (no surprise or prejudice shown) for both alleged constitutional violations and a lack of legal authority for the alleged due process violation [Petition 12].

REASONS FOR DENYING THE WRIT

I.

PETITIONERS PROVIDE NO SUPPORT FOR THEIR ASSERTIONS OF UNFAIR OR UNEQUAL TREATMENT.

Petitioners provide no factual support whatsoever for their assertion that "[t]here can be no question in this case that the jury and/or court sought to see that the local contractor received payment from his out-of-town customers" [Petition 13]. What *is* in fact unquestionable here is that Petitioners had a weak defense at trial and no reversible error (other than the award of prejudgment interest) on which to base their appeal. "Federal questions" were manufactured in an attempt to bolster unwarranted appeal issues. Petitioners have nothing to offer this Court in the way of policy-analysis or law-making opportunities. The Petition is wholly devoid of merit.

In Petitioners' first argument, Al Braumiller complains of no notice of trial on Respondent's guaranty claim [Petition 14].

His subsequent statement — that the trial court ruled that the case would be tried only on the contracting-party claim — misrepresents the facts that he himself presented in his Statement of the Case. There the trial judge is quoted as stating that

> the pre-trial order is amended to reflect the allegations of the amended pleadings to the effect that plaintiff claims that defendant Allen Braumiller is a party to the contract *as well as a guarantor*

[Petition 9 (emphasis added)].

Even if the remainder of the exchange between court and counsel was something less than clear, Al Braumiller can hardly profess surprise that the guaranty claim was tried. As the appellate court noted, he did not ask for a continuance because of his "surprise." Moreover, the *initial petition* included the guaranty claim, the *pre-trial order* included the guaranty claim, and Al Braumiller submitted *two motions for summary judgment* on the guaranty claim.

Al Braumiller cites authority for an argument that the pre-trial order governs the trial of the case [Petition 14]. But again, he disregards the facts: (1) the fact that the pre-trial order *included* the guaranty claim up until the first day of trial; and (2) the fact that, upon his request that the court amend the pre-trial order to *drop* the guaranty claim, the court instead amended the order to *keep* the guaranty claim while adding the contract claim raised in the amended petition (filed on the same day as the pre-trial order). Argument and authority that do not fit the facts are pointless.

As this "no-notice" complaint is the foundation of Petitioners' alleged due process question, this much of their case for a writ of certiorari from this Court is groundless.

Next Petitioners Boulden and Colin Braumiller complain that they were denied equal protection and due process afforded to other *similarly situated* corporate officers and their private property unconstitutionally taken [Petition 14-15]. However, they do not cite any authority that says that individuals are to be shielded from personal liability for contracts made *before* the individuals formed the corporation they would stand behind. Oklahoma law provides that a corporation is formed by filing a certificate of incorporation with the Secretary of State. Okla. Stat. tit. 18, § 1005(A) (1991). In this instance, the oral contract was formed on *July 23, 1993*, when Petitioner Al Braumiller called Respondent to accept his bid, and the corporation was formed on *August 6, 1993*, when Petitioners Boulden and Colin Braumiller filed their certificate of incorporation. Petitioners omit the latter fact from their Statement of the Case and mention the date of the incorporation only in the section entitled Stage at Which Federal Question Raised [Petition 13].

Petitioners cite authority for an argument that corporations conduct business through their officers and that shareholders are shielded from liability for corporate debt unless the certificate of incorporation specifically imposes such liability [Petition 15]. This authority, too, is irrelevant where the certificate of incorporation establishes that no corporation existed to conduct business until after the construction contract was made and where, as a result, no corporate debt to Respondent existed from which any shareholders could be shielded.

Absent factual support for this "corporate-shield" complaint, the allegation of an unconstitutional taking of private property also fails — and with it, the balance of Petitioners' case in this Court.

Petitioners' second argument — that this Court should speak on substantive due process protection of property interests from

"arbitrary state governmental infringement" [Petition 15-17] — presumes that Petitioners' case actually concerns an arbitrary state governmental infringement. Because it patently does not, no discussion of substantive due process protection or conflict among circuit courts is called for.

The reality is that Oklahoma law was correctly and fairly applied in the trial court below. The intermediate appellate court appropriately affirmed and in the process produced a well-crafted opinion (in which all three judges concurred) that detailed the factual underpinnings of the various rulings. That same court was unconvinced by Petitioners' arguments for rehearing. And finally, all justices of the Oklahoma Supreme Court concurred in the denial of certiorari. There is simply nothing in this case that warrants this Court's review.

II.

RESPONDENT SHOULD BE AWARDED ATTORNEY FEES.

Respondent submits that he should be awarded attorney fees and costs against Petitioners and their counsel for the necessity of responding to a frivolous petition for a writ of certiorari. Sup. Ct. R. 42.2 (1997).

CONCLUSION

For the reasons provided above, the Petition should be denied and Respondent awarded attorney fees and costs.

Respectfully submitted,

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